IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-5772

ANTHONY PASQUALL FARETTA,

Petitioner,

v.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEAL
SECOND APPELLATE DISTRICT

BRIEF OF RESPONDENT IN OPPOSITION

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ON PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, SECOND APPELLATE DISTRICT

BRIEF OF RESPONDENT IN OPPOSITION

OPINIONS BELOW

On June 26, 1973, the California Court of Appeal, Second Appellate District, Division Two, rendered an unpublished opinion affirming the guilt of petitioner as to one count of grand theft, a violation of section 487, subdivision 3, of the California Penal Code.

On July 16, 1973, a petition for rehearing was denied by the California Court of Appeal and on August 22, 1973, a petition for hearing was denied by the California Supreme Court, both without opinion.

JURISDICTIONAL STATEMENT

Petitioner states that the court has jurisdiction in this matter based upon "the mandatory provisions of section 1257(3) of the United States Code as annotated."

QUESTIONS PRESENTED

Petitioner raises the following questions:

1. Does a defendant have the absolute right to defend himself at trial under the Sixth Amendment to the United States Constitution?

2. Was petitioner denied his right to compel the attendance of witnesses?

STATEMENT OF THE CASE

In an information filed by the District Attorney of Los Angeles County, petitioner was charged with grand theft, a violation of section 487, subdivision 3, of the California Penal Code. (Cl. Tr. p. 1.) Additionally, prior convictions were alleged. (Cl. Tr. p. 2.)

A public defender was appointed to represent petitioner. Petitioner pleaded not guilty. (Cl. Tr. p. 3.) The public defender was relieved, and petitioner's motion to appear in propia persona was granted. (Cl. Tr. p. 4.)

Petitioner's pro per status was revoked, and the public defender was appointed to represent him. (Cl. Tr. p. 7.)

Petitioner's motion under section 995 of the California Penal Code was denied. (Rep. Tr. p. 28.) Petitioner denied the prior convictions. Trial was by jury. (Cl. Tr. p. 9.)

Petitioner was found guilty as charged. (Cl. Tr. p. 47.) The alleged prior convictions were found to be true. (Cl. Tr. pp. 48-51.)

The court struck the prior convictions. Probation was denied, and petitioner was sentenced to the state prison for the term prescribed by law. (Cl. Tr. p. 55.)

Petitioner appealed from the judgment of conviction. (Cl. Tr. p. 56.)

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On July 16, 1973, a petition for rehearing was denied by the California Court of Appeal and on August 22, 1973, a petition for hearing was denied by the California Superior Court, both without opinion.[1/]

ARGUMENT

I

THE TRIAL COURT HAD THE RIGHT TO REVOKE PETITIONER'S "PRO PER" STATUS AND A DEFENDANT DOES NOT HAVE THE ABSOLUTE RIGHT TO DEFEND HIMSELF

Petitioner contends that he had an absolute right to represent himself at the criminal proceedings concerning him. (Petn. pp. 14-20.)

In the case at bar, the court initially granted petitioner's motion to represent himself. (Rep. Tr. pp. 12-14.)

Subsequently, the court again questioned petitioner pursuant to a determination as to whether he was competent to represent himself. When asked how many exceptions there were to the hearsay rule, petitioner answered that the hearsay rule could best be called the best evidence rule, and that there were no exceptions. (Rep. Tr. p. 20.) The court asked petitioner other questions concerning his ability to represent himself. (Rep. Tr. pp. 20-22.) The court then revoked his

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1. A Statement of facts is not presented because the issue presented by petitioner do not concern or relay on evidence presented at trial.

"pro per" privilege and appointed the public defender to defend him. (Rep. Tr. p. 23.)

The petitioner's appeal to the California Court of Appeal and in his peti on for hearing before the California Court of Appeal, petitioner merely argued that the trial court improperly revoked his "pro per" status. He argued that since a retained trial counsel cannot be summarily relieved that therefore, pro per status could not be summarily revoked.

It is submitted that since petitioner did not present his present contention before the state appellate courts in the form of a federal question, concerning the Constitution, treaties or laws of the United States, namely, whether he had the absolute right under the Sixth Amendment of the United States Constitution to represent himself, that therefore the contention should not be heard. Cf. Bryant v. Zimmerman, 278 U.S. 63, 67 (1928).[2/]

Assuming the court chooses to hear the issue then it is submitted that a defendant does not have the absolute

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2. When the trial court revoked appellant's "pro per" status, appellant stated:

". . . According to the Sixth Amendment, a defendant has the right to assistance of counsel of his choice, and I believe those are words that are used, when I say "assistance."

"Now if the Court would find it appropriate that defendant act as co-counsel in the matter, I would then move that the Court would make that order."

(Rep. Tr. p. 24.)

California Court of Appeal when discussing this issue noted that "Faretta had no constitutional right to represent himself.

right, under the Sixth Amendment to the Constitution, to defend himself. The California Supreme Court in People v. Sharp, 7 Cal. 3d 448, 103 Cal. Rptr. 233 (cert.denied 410 U.S. 944) held that under the Sixth Amendment, a defendant does not have an absolute right to defend himself and reasoned as follows:

> "In England in precolonial times an accused was as a practical matter, required personally to present his defense if any was to be offered.[3]

> "3 '[I]n matters of fact upon trial, the court are of counsel for you.' (10 Howell's State Trials, Trial of Thomas Rosewell (1684) 147, 151; see also, 1 Pollock & Maitland, History of English Law, p. 211."

> Later he was entitled to representation by counsel in all cases except those involving treason, but counsel's functions were limited. The right to put on a full defense through counsel, whatever the nature of the charge, did not become available until 1836 in England. (Radin, Anglo-American Legal History, p. 230.) The emphasis during this period of the English law was on the right to counsel and, apparently because self-representation was so commonplace, the courts were not called upon to make pronouncements as to whether the right was fundamental.
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> "In American colonial times self-representation was also commonplace. The early declarations of rights in this area were principally concerned with the right to counsel, and did not deal directly with the right of self-representation. Perhaps the

pronouncement most nearly declaring a right of self-representation is the following appearing in the Pennsylvania Frame of Government (1682): 'That, in all courts all persons of all persuasions may freely appear in their own way, and according to their own manner, and there personally plead their own cause themselves: or, if unable, by their friends. . . .' (See I Schwartz, The Bill of Rights, p. 140.)

> "The Georgia Constitution of 1777, in declaring unauthorized persons who practiced law to be guilty of malpractice, indirectly dealt with the right of self-representation in the following language: 'This is not intended to exclude any person from that inherent privilege of every freeman, the liberty to plead his own cause.' (See I Schwartz, The Bill of Rights, p. 300.) There is language in other colonial declarations of rights which indicate that the concern was not so much the right of self-representation as it was the right not to be compelled to employ and pay counsel in defense of criminal charges. Chapter XXIII of the Concessions and Agreements of West New Jersey (1677) provided: '. . and that no person or persons shall be compelled to fee any attorney or counciller to plead his cause, but that all persons have free liberty to plead his own cause, if he please: And that no person or persons imprisoned upon any account whatsoever within this Province, shall be obligated to pay any fees to the officer or officers of the said prison, either when committed or

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discharged.'[4] (See I Schwartz, The Bill of Rights, p.129.)

"4 The Massachusetts Body of Liberties (1941) similarly provided: 'Every man that findeth himselfe unfit to plead his owne cause in any Court shall have Libertie to imploy any man against whom the Court doth not except, to helpe him. Provided he give him noe fee or reward for his paines. This shall not except the partie him selfe from Answering such Questions in person as the Court shall thinke meete to demand of him.' (See 1 Schwartz, The Bill of Rights, p. 74.)

"We are able to discern from our examination of the early declarations only vague notions of a fundamental right of self-representation which predated the federal Constitution. We now examine the federal Constitution in an effort to determine whether it guarantees such a right.

"The Sixth Amendment of the United States Constitution provides that an accused in a criminal prosecution 'shall enjoy the right . . . to have the Assistance of Counsel for his defence.' In addition to this specific provision, the right to representation by counsel is often held to be compelled on due process grounds and a trial where an accused cannot effectively defend for lack of assistance of competent counsel is fundamentally unfair. [Citations.]

"It is apparent, of course, that constitutional language granting the right to the assistance of

counsel lends no express support to a claim that an accused has the constitutional right to defend without counsel. Nor can due process requirements, in the sense that what justice seeks to achieve is a fair trial, be construed as demanding that an accused be entitled to defend without counsel merely because he is of a mind to do so. This is not to say that the right to counsel, like other constitutional rights, may not be waived in a proper case. Moreover, the Sixth Amendment guarantees only 'assistance,' and does not expressly purport to 'force a lawyer upon a defendant.' [Citations.] Nevertheless, the right to waive a constitutional protection is not itself necessarily a right of constitutional dimensions. [Citations.] In Singer the court had before it the validity of rule 23(a) of the Federal Rules of Criminal Procedure, conditioning the waiver of a jury upon the consent of the government and the court. In response to the argument that the Sixth Amendment's right to a jury trial conferred also a correlative constitutional right to waive a jury, the court stated, 'The ability to waive a constitutional right does not ordinarily carry with it the right to insist upon the opposite of that right. . . . [W]e find it difficult to understand how the petitioner can submit the bald proposition that to compel a defendant in a criminal action to undergo a jury trial against his will is contrary to his right to a fair trial or to due process.' (380 U.S. at pp. 34-36 [13 L.Ed.2d at p. 638].)

"Although the court in Singer did not address itself to the right to counsel, no sufficient reason

appears why the waiver of that Sixth Amendment right is a constitutional right when the waiver of the Sixth Amendment's right to a jury trial is not. In either event, a refusal for good cause to give effect to a waiver accords to the accused the very thing the Constitution expressly guarantees him.

"The Supreme Court has never ruled directly upon the issue of a claimed constitutional right to appear pro se. Accuseds' rights in federal courts to 'plead and conduct their own cases personally or by counsel' are expressly conferred only by statute.[5] Consistent with the statutory provisions

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"5 'In all courts of the United States the parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes there.' (28 U.S.C. § 1654; see also The Judiciary Act of 1789.)

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the court has recognized a right to waive counsel, but it has imposed conditions on such right of waiver which appear to give it less stature than the 'Constitutional right' which is being waived.[6]

"6 In dictum in Adams v. United States, supra, 317 U.S. 269, the court stated: 'The right to [the] assistance of counsel and the correlative right to dispense with a lawyer's help are not legal formalisms. . . . [T]he Constitution does not force a lawyer upon a defendant.

"He may waive his Constitutional right to [the] assistance of counsel if he knows what he is doing

and his choice is made with eyes open.' (317 U.S. at p. 279 [87 L.Ed. at pp. 274-75]; italics added.)"

"The court has also stated, in a case often relied upon in support of a claimed constitutional right to appear pro se, that 'Neither the historic conception of Due Process nor the vitality it derives from progressive standards of justice denies a person the right to defend himself or to confess guilt. Under appropriate circumstances the Constitution requires that counsel be tendered; it does not require that under all circumstances counsel be forced upon a defendant.' [Citations.] Consistent with the express language of the Constitution itself, Carter recognizes that counsel may not be forced upon a defendant in 'all circumstances'; alternately it must be deemed to recognize that there are circumstances when a defendant must be represented. The holding of Carter is that the record failed to disclose that the accused could not and did not effectively waive counsel. We perceive in neither the language nor the holding support for the proposition that the right to defend pro se is constitutionally compelled. 'All that has really been said by the Supreme Court [in Carter] is that the Sixth Amendment does not prohibit the right of self-representation.' [Citations.]

"The federal Courts of Appeal are divided on the foregoing proposition. The leading case holding that there is a constitutional right to appear pro se is United States v. Plattner (2d Cir. 1964) 330 F.2d 271. The court there relied upon dictum in Adams (supra, fn. 3) to conclude that the Sixth

Amendment 'was surely not intended to limit in any way the absolute and primary right to conduct one's own defense in propria persona.' (330 F.2d at p. 274.) Giving at least passing support to Plattner are Lowe v. United States (7th Cir. 1969) 418 F.2d 100, 103; United States v. Sternman (6th Cir. 1969) 415 F.2d 1165, 1169-70; and Arnold v. United States (9th Cir. 1969) 414 F.2d 1056, 1058. It is to be noted, however, that at least some of those courts which hold that the right to defend pro se is constitutionally compelled do not accord to such right the same force and vitality as the constitutional right to counsel, for they also place conditions on the right to waive (see United States v. Plattner, supra, 330 F.2d 271, 276), and are willing to hold that the denial of the pro se right is not reversible error when no prejudice is shown (see United States v. Abbamonte (2d Cir. 1965) 348 F.2d 700, 704). Moreover, the federal Courts of Appeal of the Eighth, Tenth and District of Columbia Circuits recognize that the pro se right is not constitutionally compelled.[7]

"7 'We find nothing in the Constitution which confers [the right to proceed pro se], or from which a guaranty of such right may be inferred. The truth is that the right [in the federal court] is statutory in character, and does not rise to the dignity of one conferred and guaranteed by the Constitution." [Citations.]

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"In almost 200 years of constitutional interpretation and construction the Supreme Court has not on any occasion held that the right of self-representation in a criminal trial is constitutionally compelled. (See Comment, Self-Representation in Criminal Trials: The Dilemma of the Pro Se Defendant, 59 Cal.L.Rev. 1479, 1487.) Although it is recognized that the Constitution must be read to give it currently relevant meaning in a developing society, there is no express language in any of its provisions which reasonably supports a right of pro se representation. Moreover, as will be seen in the following discussion of California constitutional requirements, social and judicial changes which have taken place during the almost 200 years require greater rather than lesser limitations on the right of self-representation. We conclude that there is no express federal constitutional compulsion to accord an accused the right of self-representation in criminal trials."

It is submitted that this Court should adopt the cogent reasoning of the California Supreme Court and hold that a defendant, under the Sixth Amendment to the United States Constitution, does not have an absolute right to defend himself.

II

PETITIONER WAS NOT DENIED HIS RIGHT TO SUBPOENA WITNESSES

Petitioner contends that he was denied his right to compel the attendance of witnesses, in particular Charles Cunningham, in violation of due process of law. (Petn. pp. 21-24.)

Petitioner did not present this claim at trial and on appeal to the California Court of Appeal did not present the question in the form of a federal question, concerning the Constitution, treaties or laws of the United States. Therefore, it is submitted that this contention should not be heard. Bryant v. Zimmerman, supra, 278 U.S. 63, 67 (1928.)

Moreover, here, petitioner failed to raise the issue in his petition for hearing before the California Supreme Court, thus it is submitted that he can not now raise it. Cf. Beck v. Washington, 369 U.S. 541, 553 (1962)[3/] Bean v. Richardson, 276 U.S. 599 (1927).

Furthermore, the California Court of Appeal rejected the contention because it was not presented at trial and because petitioner's testimony at trial indicated Mr. Cunningham could not be found. Thus, the issue should not be reversed because the decision was based on an adequate non-federal ground. See Staub v. City of Baxley, 355 U.S. 313, 318.

Assuming the court chooses to hear the issue then it is submitted petitioner was not denied the right to compel the attendance of witnesses under the Sixth Amendment to the United States Constitution.

At trial, there was the following testimony by

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3. Rule 29(b) of the California Rules of Court states that:

"On petition for hearing the Supreme Court will not examine the record for error unless the petitioner shows that substantial issues of law or fact were incorrectly stated or were not considered in the opinion of the Court of Appeal and that said issues were raised in the briefs and set forth in a petition for rehearing in the Court of Appeal."

petitioner concerning Charles Cunningham:

"Q You don't know where Charles is?

"A I don't.

"Q Have you made any efforts to find him?

"A Previous to a competency hearing and my subsequent termination, you know, of defendant's representative for defendants, I had subpoened Charles Cunningham to the County for an interview, and I called his mother several times. I had tried to contact him, and I asked Mr. Lieman to endeavor to contact him, and all this has proved fruitless." (Rep. Tr. p. 232.)

Therefore, it appears that Mr. Cunningham was not called because he could not be located, and there is nothing in the record to indicate that he was not called or located because of the actions of the trial court, or because he was not representing himself. (See Petn. pp. 22-23.)[4/] Cf. Washington v. Texas, 388 U.S. 14 (1967).

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4. The only reference to the calling of witnesses by the defense was as follows:

"THE COURT: Have you got any witnesses?

"THE DEFENDANT: Yes, your Honor.

"THE COURT: How are you going to get a hold of them?

"THE DEFENDANT: Well, your Honor, I had hoped the court would grant me access to the law library and I can reach most of them by telephone. I did plan on having a legal runner, who is competent of doing some investigation groundwork." (Rep. Tr. p. 10.)

CONCLUSION

For the foregoing reasons, it is respectfully requested that the petition for certiorari be denied.

Respectfully submitted,

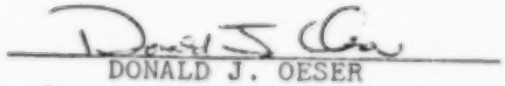
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